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DATE FILED: 10/07/2010

09-4746-cv
Vandermark v. City of N.Y.
MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

08cv5332(SAS)

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

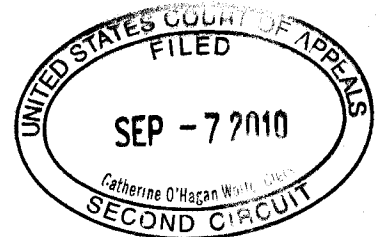
At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of September, two thousand ten.

PRESENT: DENNIS JACOBS,
Chief Judge,
REENA RAGGI,
Circuit Judge
JED S. RAKOFF,*
District Judge.

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Marshall Vandermark, as Environmental
Police Officers employed by New York
City, and Law Enforcement Employees
Benevolent Association LEEBA et al.
Plaintiffs-Appellants,

Jon Shamaro, Jason Shaw, Matthew Wood,
Plaintiffs,

-v.-



09-4746-cv

* District Judge Jed S. Rakoff, Judge of the United States District Court for the Southern District of New York, sitting by designation.

MANDATE ISSUED ON 10/06/2010

1 City of New York, Water Board for New
2 York City, Department of Environmental
3 Protection, Local 300 SEIU, Mayor
4 Michael Bloomberg, Commissioner Emily
5 Lloyd, Chief Edward Welch,
6 individually and in their
7 representative capacities, President
8 James Golden, Local 300, SEIU, & Local
9 300 SEIU,

10 Defendants-Appellees.

11 - - - - -X

12
13 **APPEARING FOR APPELLANTS:** RICHARD J. MERRITT, Lindenhurst,
14 NY.

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16 **APPEARING FOR APPELLEES:** SUSAN B. EISNER, Stephen J.
17 McGrath, Donna Anne Canfield,
18 Michael A. Cardozo, Corporation
19 Counsel of the City of New York,
20 New York, NY.

21
22 JOEL SPIVAK, Mirkin & Gordon,
23 P.C., Great Neck, NY, for
24 Defendant-Appellee Local 300
25 SEIU.
26

27 Appeal from a judgment of the United States District
28 Court for the Southern District of New York (Scheindlin,
29 J.).

30 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
31 **AND DECREED** that the judgment is **AFFIRMED.**

32 Plaintiffs appeal from a May 4, 2009 order of the
33 United States District Court for the Southern District of
34 New York (Scheindlin, J.). In the main, they are
35 Environmental Police Officers (EPOs) employed by the City of
36 New York. They assert various state and federal claims

1 principally challenging their compensation and benefits.
2 The district court dismissed the federal claims for failure
3 to state a cause of action, and declined to exercise
4 supplemental jurisdiction over the state law claims. We
5 otherwise assume the parties' familiarity with the
6 underlying facts, the case's procedural history, and the
7 issues presented for review. We review the district court's
8 order de novo. E.g., Ruston v. Town Bd. for Town of
9 Skaneateles, 610 F.3d 55, 58 (2d Cir. 2010).

10 The plaintiffs appeal the dismissal of their claims
11 under the Fair Labor Standards Act (FLSA), the Age
12 Discrimination in Employment Act (ADEA), the Labor
13 Management Relations Act (LMRA), the Employee Retirement
14 Income Security Act (ERISA), and Title VII of the Civil
15 Rights Act; and their 42 U.S.C. §§ 1983 and 1985 equal
16 protection claims. Dismissal of the other claims is either
17 unchallenged on appeal, or the challenge is forfeited. See,
18 e.g., Tolbert v. Queens Coll., 242 F.3d 58, 75 (2d Cir.
19 2001) ("It is a settled appellate rule that issues adverted
20 to in a perfunctory manner, unaccompanied by some effort at
21 developed argumentation, are deemed waived." (internal
22 quotation marks omitted)).

1 The district court correctly dismissed the plaintiffs'
2 ADEA, Title VII, Equal Protection, and LMRA and ERISA
3 claims.

4 • Title VII: To establish their Title VII claim, the
5 plaintiffs would need to show employment
6 discrimination on the basis of "race, color,
7 religion, sex, or national origin." 42 U.S.C.
8 § 2000e-2(a)(1). They alleged no such nexus.

9 • ADEA: To establish their ADEA claim, the
10 plaintiffs would need to show employment
11 discrimination on the basis of age. 29 U.S.C.
12 § 623(a)(1). Alleging unequal retirement benefits
13 does not allege age discrimination.

14 • Equal Protection: To establish their §§ 1983 and
15 1985 equal protection claims, the plaintiffs would
16 need to show that there is no "reasonably
17 conceivable state of facts that could provide a
18 rational basis for the classification." Yuen Jin
19 v. Mukasey, 538 F.3d 143, 158 (2d Cir. 2008)
20 (emphasis in original). As the district court
21 observed, "[t]here are numerous reasonable bases
22 on which the City of New York might decide that
23 NYPD officers and EPOs should receive different
24 compensation and benefits, including the danger

1 associated with the positions, the physical strain
2 of the job, and the cost of living in the areas in
3 which NYPD officers and EPOs work." Vandermark v.
4 City of N.Y., 615 F. Supp. 2d 196, 209 (S.D.N.Y.
5 2009)


- 6 • LMRA and ERISA: Neither the LMRA nor ERISA, in
7 relevant part, applies to state "political
8 subdivision[s]." 29 U.S.C. § 152(2) (LMRA); 29
9 U.S.C. §§ 1002(32), 1003(b) (ERISA); cf. Ford v.
10 D.C. 37 Union Local 1549, 579 F.3d 187, 188 (2d
11 Cir. 2009) (per curiam) ("It is clear to us . . .
12 that the New York City Department of Health and
13 Mental Hygiene is a 'political subdivision' of New
14 York that is exempt under § 152(2).").

15 Respecting the plaintiffs' FLSA claim, the district
16 court correctly applied the § 207(k) exemption, 29 U.S.C.
17 § 207(k). Based on the undisputed facts of this case, EPOs
18 [1] are "empowered . . . to enforce laws . . . , and to
19 prevent and detect crimes"; [2] "ha[ve] the power to
20 arrest"; and [3] "undergo on-the-job training and/or a
21 course of instruction and study which typically includes
22 physical training, self-defense, firearm proficiency,
23 criminal and civil law principles, investigative and law

1 enforcement techniques, community relations, medical aid and
2 ethics." 29 C.F.R. § 553.211(a).

3 Finding no merit in the plaintiffs' remaining
4 arguments, we hereby **AFFIRM** the district court's judgment.

5
6
7 FOR THE COURT:
8 CATHERINE O'HAGAN WOLFE, CLERK
9

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit